

1/28/10

Talking Points for Conversation with Irene Kropp

- EPA and DEP have agreed that the approach laid out in the New Jersey Site Remediation Reform Act (SRRRA) will not apply to National Priorities List sites. This should be the case as to both final and proposed NPL sites.
- As you know, almost all of the NPL sites in New Jersey are currently EPA-lead sites. EPA has the lead role in performing the site investigations and cleanups or in overseeing the PRPs' performance of the work.
- We also should talk about RCRA facilities. This includes but isn't limited to the 106 RCRA corrective action sites in New Jersey which are supposed to have remedy constructions completed by 2020.
- Although DEP is not authorized for the RCRA corrective action program, in practice we've agreed that DEP will have the lead as to most of the 106 sites. EPA has the lead as to about 10 or 11 of them, though even as to those, we give funding to DEP to use in conducting oversight of the work on EPA's behalf.
- These RCRA sites are priority sites that EPA is accountable for, and so it's important to us that DEP and EPA remain closely involved in overseeing the site investigations and cleanup work at these facilities, and making decisions about the remedies to be performed there.
- So, we would like your commitment that DEP will perform "**direct oversight**" of all of these RCRA sites, rather than relying on the oversight and certifications of Licensed Site Remediation Professionals.
- DEP should make sure that the owners/operators of these RCRA sites understand that they should not implement the corrective action at the site until their proposed remedy has been approved by DEP and EPA
- To help ensure that DEP can do direct oversight at these RCRA sites, we think that DEP should place these sites in the highest priority category in the ranking system that DEP is going to be putting in place.

Background info: Section 27.a. of the NJ Site Remediation Reform Act says that DEP "**shall** undertake direct oversight of a remediation of a contaminated site" under 3 conditions, all of which basically deal either with parties that have a

history of noncompliance or parties that have failed to meet certain deadlines. In addition, Section 27.b. of the SRRA says that DEP “**may**” undertake direct oversight of a remediation of a contaminated site under 4 other conditions: (1) the contamination at the site includes chromate chemical production waste; (2) DEP determines that more than one “environmentally sensitive natural resource” has been injured by contamination from the site; (3) the site has contributed to sediments contaminated by PCBs, mercury, arsenic, or dioxin; or (4) **the site is ranked by DEP in the category requiring the highest priority pursuant to the ranking system that DEP is supposed to develop.**

[The SRRA requires DEP to issue guidelines establishing criteria for the conditions under which a site may be subject to direct oversight pursuant to Section 27.b. Pursuant to this req’t., DEP issued a 3-page guidance document in November 2009 that fleshes out conditions (1)-(3) above and also lists several other conditions that may increase or decrease the likelihood that DEP will apply direct oversight.]

Section 39 of the SRRA says that within one year of the date of enactment of the SRRA – i.e, by 5/7/10 – DEP “shall establish a ranking system that establishes categories in which to rank sites based upon the level of risk to the public health, safety, or the environment, the length of time the site has been undergoing remediation, the economic impact of the contaminated site on the municipality and on surrounding property, **and any other factors deemed relevant by the department.**” One of the factors that should be “deemed relevant” by DEP in setting the ranking categories is whether a site is a RCRA corrective action site or otherwise part of EPA’s RCRA universe.

- We are concerned that unless the regulated community clearly understands that DEP will be doing direct oversight of these RCRA sites, companies may go ahead with remediation work at these sites – indeed they may feel that the SRRA **requires** them to – even though the cleanup plans have not been approved by DEP or EPA.
- The SRRA has a provision that talks about DEP doing “additional review,” in certain circumstances, of documents submitted by LSRPs. But that’s a lower level of oversight than the “direct oversight” that we think is needed for the RCRA sites. First, under the SRRA, the “direct oversight” approach requires there to be an opportunity for public comment on the remediation plan -- which is something that our RCRA corrective action program requires too – whereas that doesn’t seem to be required under the “additional review” process.
- Second, Section 21 of the SRRA says, “Unless directed otherwise by the department, the person responsible for conducting the remediation and the licensed site remediation professional **may continue to conduct the remediation while the department conducts any inspection or additional review of documents pursuant to this section.**”

- In fact, DEP's regulations ("Administrative Requirements for the Remediation of Contaminated Sites") say that the person responsible for conducting the remediation **shall go ahead with the remediation without waiting for DEP approval "except if the Department has undertaken direct oversight."**

7:26C-2.4. Requirements for a person who initiated remediation on or after November 4, 2009

(a) Any person who initiates remediation on or after November 4, 2009 shall:

... ..

3. Conduct the remediation of the discharge:

i. Without prior Department approval, except if the Department has undertaken direct oversight of a site, area of concern or site condition pursuant to [Section 27 of the SRRA]

... ..

- At the RCRA sites, we can't have the private parties going ahead with cleanup plans that EPA and DEP haven't approved. This would be avoided under the "direct oversight" approach in the SRRA. Under the "direct oversight" provision, DEP is supposed to review each document submitted by an LSRP and approve or disapprove it. Feasibility studies (which are analogous to Corrective Measures Studies under RCRA) are supposed to be submitted to DEP for approval. And DEP, not the regulated party or the LSRP, is supposed to select the remedial action for the site.

[Possible additional point to say, or hold in back pocket as a fallback:]

- If there is an alternative avenue that DEP could pursue with these RCRA sites, in lieu of the "direct oversight" route in the SRRA, and that other avenue would still give EPA what it needs, we can discuss that. But we would need to be satisfied that DEP has the legal authority to take that approach.